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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1631

SOCIALIST WORKERS PARTY,

Petitioner,

v.

E. T. KLASSEN, Postmaster General of the United States, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Supreme Court of the United States

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review a judgment affirming the district court's grant of summary judgment to the respondents.

Judgments and Opinions Below

The Court of Appeals did not file an opinion in this case. Its judgment affirming the judgment of the District Court is set forth in Appendix B, *infra*, pp. 3a-4a. The opinion of the District Court is reported at 336 F. Supp. 1271 and appears in Appendix D, *infra*, pp. 7a-11a. The order of the District Court appears in Appendix C, *infra*, pp. 5a-6a.

Jurisdiction

The judgment of the Court of Appeals was entered on March 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the provisions of Executive Orders 9835 and 10450, authorizing the Attorney General to designate organizations as totalitarian, fascist, communist, subversive, etc., are unconstitutional on their face.

2. Whether the Attorney General's designation of organizations pursuant to Executive Orders 9835 and 10450 violates the First, Fifth and Tenth Amendments to the Constitution and constitutes a bill of attainder.

3. Whether an organization which the Attorney General has designated as "subversive" or its members may challenge the constitutional power of the Attorney General to list organizations without first exhausting the administrative procedures set up by the Attorney General.

Executive Orders Involved

The pertinent provisions of Executive Orders 9835 and 10450 are set forth in Appendix A, *infra*, pp. 1a-2a.

Statement of the Case

On March 21, 1947 Executive Order 9835 was promulgated. This Order established a Loyalty Review Board and provided that the Department of Justice should furnish to the Board a list of organizations determined to be "totalitarian, fascist, communist or subversive." On November 25, 1947, the Attorney General of the United States, pursuant to this Executive Order transmitted to the Board a list of organizations which included the name of the Socialist Workers Party (herein called "SWP").[1]

On or about September 17, 1948 the Attorney General, by letter to the Board included the SWP as one of the organizations

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1. Public notice of this action was given in the Federal Register on March 20, 1948, 13 F.R. 1471.

characterized as "communist," as one of the organizations characterized as "subversive" and as one of the organizations characterized as "organizations which seek to alter the form of Government of the United States by unconstitutional means." 13 F.R. 6135.

On or about April 29, 1953 the Attorney General, pursuant to Executive Order 10450, which superseded Executive Order 9835, reissued the list, but without the separate characterizations. The name of the SWP was retained on the list.[2]

On October 8, 1968 Duncan Gordon, a member of the SWP, commenced working for the United States Post Office Department in California as a substitute letter carrier. Approximately five months later, the Bureau of Personnel Investigation, Division of Adjudication and Appraisal of the Civil Service Commission wrote to Mr. Gordon stating that he had answered "No" on his job application form to the question

> "are you now or have you ever been a member of any organization that favors the overthrow of the constitutional form of the government of the United States or which seeks by force or violence to deny other persons their rights under the Constitution of the United States."

The letter also stated that the Civil Service Commission had received information that Gordon had been a member of the SWP since February, 1968 and that this Party "has been designated by the Attorney General of the United States, pursuant to the provisions of Executive Order 10450. It has been reported that the Socialist Workers Party advocates and teaches the overthrow of the United States Government by force or violence."

Gordon responded by letter stating:

> I am not now nor have I ever knowingly been a member of any organization that favors the overthrow of the

2. Public notice of this action was given in the Federal Register on May 12, 1953, 18 F.R. 2741.

constitutional form of the Government of the United States, or which seeks by force or violence to deny other persons their rights under the Constitution of the United States."

In response, the Chief of the Division of Adjudication and Appraisal wrote to Gordon stating that it has found him to "have been a member of the Socialist Workers Party, an organization which advocates and teaches the overthrow of the United States Government by force or violence," and that Section 732.201 of the Civil Service Regulations lists "intentional false statements" as a disqualification for employment in the competitive federal service. In the same letter the Division directed the Post Office to remove Gordon from the postal service, cancel his eligibility for employment in the Federal Government and barred him from competing in examinations or accepting employment in the competitive federal service for one year.

Gordon then appealed to the Bureau of Personnel Investigations stating that he had been a member of the SWP since February 1969, that the SWP was a legal organization whose aim was to peacefully bring about socialism in the United States. He also stated he had not falsely answered any question since he did not "belong to any organization which advocated the overthrow of the United States Government by force or violence."

On September 16, 1969 the Bureau of Personnel Investigations upheld the decision of the Division of Adjudication and Appraisal. Gordon then appealed to the Board of Appeals and Review of the Civil Service Commission which, on November 26, 1969 affirmed the previous decisions stating in part:

> "In view of Mr. Gordon's membership in organizations which advocates or teaches the overthrow of the government of the United States as well as his failure to admit his membership in said organizations on his application, and since Mr. Gordon has not presented any new or additional information to support his appeal, the board sustains the findings of the Bureau of Personnel Investi-

gation that Mr. Gordon is not suitable for federal employment under the requirements of Section 731.201 of the Civil Service Regulations."

Following this decision Gordon was removed from his employment on December 10, 1969.

Gordon and the SWP then brought suit in the District Court for the District of Columbia. Gordon claimed that the Civil Service Commission decision, in ordering his dismissal from the Post Office, was illegal in that, *inter alia,* there were no facts or evidence to support the finding that he falsely answered a question on his job application and that the activities in which he was engaged were protected by the First Amendment. He sought to have his discharge declared invalid and to be reinstated to his position. Petitioner SWP alleged that the Attorney General's list constituted governmental censorship of expression in violation of the First Amendment, exceeded the powers of the Executive Branch of the government and constituted a bill of attainder. It sought a declaratory judgment that the listing of the SWP was illegal and that the Executive Orders authorizing such listing were unconstitutional. It further sought to have its name removed from the list, and an injunction restraining the use of the list.

Following the respondents' answer, both sides moved for summary judgment. Prior to the time that the District Court heard argument on these motions, the respondents restored Duncan Gordon to his former position with full rights to back pay. After hearing argument, the District Court held that the case as to Gordon was moot since he had been restored to employment, *infra,* p. 8a.

With respect to the petitioner SWP, the District Court rejected the argument of respondents that the doctrine of laches and exhaustion of administrative remedies precluded the SWP from attacking "the *use* of the list as it affects its members or the constitutionality of the list itself," *infra,* p. 10a. Despite this the District Court did not discuss or consider petitioner's constitutional challenge to the list. It merely concluded, relying on an

unreported decision in the Northern District of California in the case of *Cummings and Rudd v. Hampton*, No. C-70 2130 (N.D. Calif.) that "even in light of the fact that the statutory authority which provided the primary support for Executive Order 10450 as originally promulgated, sections 7311 and 3333 have been declared unconstitutional [citing *Stewart v. Washington*, 301 F. Supp. 610 (D.D.C. 1969)], ample statutory authority exists to support Executive Order 10450 as a valid exercise of authority," *infra*, p. 11a.[3] The court further held that the Attorney General's list could not lawfully be used as it had been to effectuate Gordon's discharge, *infra*, p. 11a.

Accordingly, the District Court issued an order enjoining the use of the Attorney General's list "as the sole basis for finding that any member of the Socialist Workers Party is making a false statement if he denies that he belongs or has belonged to an organization which advocates, teaches or favors the overthrow of the constitutional form of government of the United States." *Infra*, pp. 5a-6a.

Except for the above, the District Court's order denied the petitioner's motion for summary judgment and granted the respondents' motion, *infra*, p. 6a.

The petitioner appealed to the Court of Appeals of the District of Columbia Circuit arguing that, under the authoritative decisions of this Court, the listing of the petitioner and the continued maintenance of the Attorney General's list violated the First, Fifth and Tenth Amendments and constituted a bill of attainder. The government's brief in response argued that under the decision of the Court of Appeals in *Industrial Workers of the World v. Clark*, 385 F. 2d 687, *cert. den.* 390 U.S. 938, petitioner was barred from challenging the constitutionality of the list because of the doctrine of laches and exhaustion

3. The court which decided *Cummings and Rudd v. Hampton*, on reconsideration, reversed its ruling. This ruling has not been reported. A copy of the Court's opinion is attached hereto as Appendix E, pp. 12a-21a.

of administrative remedies, and that the District Court had erred in holding that such a challenge could still be made. In addition, respondents argued that the listing was constitutional.

The Court of Appeals affirmed without hearing argument and without an opinion. It recited in its Judgment that "[w]hile the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court," *infra*, p. 3a.

Reasons for Granting the Writ

1. The importance and substantial nature of the constitutional questions posed by the present case need little elaboration since they were recognized by the various opinions in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123. That decision did not reach, but cast a serious cloud on, the power of the Attorney General to list organizations as "subversive." The opinions of Justices Black and Douglas concluded that the Attorney General's list violated the First Amendment and was a bill of attainder (at 143, 177). This view was reiterated by Justices Black and Douglas in *Barsky v. Board of Regents*, 347 U.S. 442, 459.

Decisions of this Court since *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, emphasize the doubtful constitutionality of the Attorney General's list. This Court has recently held that the President does not possess any power not derived from the Constitution. *United States v. United States District Court*, 407 U.S. 297, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579. Yet the Constitution does not grant power to any governmental official to list organizations as subversive or disloyal.

This Court has held that a grant of authority to establish a list of disloyal and subversive organizations cannot be lightly inferred, *Schneider v. Smith*, 390 U.S. 17. Here, none of the statutes cited in Executive Orders 9835 and 10450 as the bases for those Orders authorize the promulgation of a list of "subver-

sive" or "disloyal" organizations.[4] Some of these statutes have been held unconstitutional.[5] Furthermore, this Court has consistently held that statutes containing such words as "subversive, communist and totalitarian" are too vague to withstand constitutional attack. *Cramp v. Board of Public Instruction*, 368 U.S. 278, *Baggett v. Bullitt*, 377 U.S. 360.

In his posthumously published book, *The Supreme Court in the American System of Government*, Mr. Justice Jackson stated (at p. 27): "In 1951 the Court cast serious doubts upon the legality of the Attorney General's list of subversive organizations promulgated in 1947. But the list had long been widely circulated and accepted, and despite the Court's views it has never ceased to be used in the press, in the executive department, by and before congressional committees, and even in courts to prejudice individuals in their liberty, position and good name."

Prof. Chafee has stated (*The Blessings of Liberty*, p. 27): "The list . . . has been widely employed by states and cities and even by private organizations as proof of the disloyalty of teachers and employees. The radio industry has accepted it as a basis for canceling the contracts of its performers. The list has accordingly become a powerful weapon for injuring any group there named or any individual who belongs to such a group."

The validity of these observations is clearly demonstrated in this very case. Here simple membership in an organization on the Attorney General's list was used by the respondents to

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4. For example, 5 U.S.C. §3301 merely allows the President to prescribe regulations for the admission of individuals into the Civil Service as will promote "efficiency" and to ascertain applicants' fitness as to "age, health, character, knowledge and ability."

5. Section 9A of the Hatch Act, 5 U.S.C. §7311, which served as the primary basis for Executive Order 10450 was declared unconstitutional in *Haskett v. Washington*, 294 F. Supp. 912 (D.D.C. 1968), and *Stewart v. Washington*, 301 F. Supp. 610 (D.D.C. 1969). The government did not appeal either of these decisions.

discharge Duncan Gordon from his position in the Post Office. His case was not an isolated incident. Other members of petitioner SWP have been investigated and charges brought against them based solely on their membership in the organization.[6]

This Court and lower federal courts have frequently had occasion to decide cases where the Attorney General's list was used as a basis of actions against individuals. *Gilmore v. James*, 274 F. Supp. 75 (N.D. Texas, 1967), *aff'd sub nom, James v. Gilmore*, 389 U.S. 572 (applicants for university employment required to sign statements of nonmembership in organizations on Attorney General's list); *Schneider v. Roland*, 263 F. Supp. 496 (W.D. Wash., 1967), *rev'd sub nom. Schneider v. Smith, supra* (list used in Coast Guard screening of applicant for merchant marine employment); *United Steel Workers of America v. Bagwell*, 383 F. 2d 492 (4th Cir. 1967) (permit to distribute leaflets barred to members in listed organizations). See also Note, *The Bill of Attainder Clause and Legislative and Administrative Suppression of "Subversives,"* 67 Col. L. Rev. 1490, 1506-1508 (1967).

In *Soltar v. Postmaster General of the United States*, 277 F. Supp. 579 (N.D. Calif. 1967), and *Cummings and Rudd v. Hampton, supra*, the court held that the government was barred from requiring an applicant for employment to answer a question on the application form as to whether or not he had ever been a member of an organization on the Attorney General's list. The government did not appeal either of these decisions, thus implicitly conceding the correctness of these holdings. Nevertheless, although the government thus recognized that the listing of organizations by the Attorney General has no legiti-

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6. Ken Evenhuis was employed in 1969 as a substitute letter carrier in the Post Office Department in Los Angeles, California. Carol Ferguson was employed in 1970 in a similar position in Minneapolis, Minnesota. Both received letters similar to the one received by Gordon, *supra*, p. 3. Both eventually were retained in their positions, see *infra*, p. 9a. This year, Alice Woznack, a biological laboratory technician with HEW, received a similar letter based, in part, on her membership in the SWP.

mate utility for its ostensible purpose, i.e., the screening of government employees, it insists on its power to maintain the list and thereby to continue to inflict incalculable damage on the organizations listed and their present and former members.[7]

2. Over the years numerous efforts have been made to challenge the constitutionality of the Attorney General's list. These efforts have been frustrated both by the application of inapposite procedural doctrines by the United States Court of Appeals for the District of Columbia Circuit and by the evasive actions of the Attorney General. Such actions, taken to avoid a determination of the important constitutional issues presented by these cases, necessitate that this Court squarely face and decide these issues.

The Court of Appeals has uniformly applied two doctrines to bar organizations, such as petitioner, from challenging the constitutionality of the Attorney General's list. First, the court has claimed that the organizations have failed to exhaust administrative remedies. See *National Council v. Brownell*, 243 F.2d 222 (D.C. Cir. 1957); *Association of Lithuanian Workers v. Brownell*, 247 F.2d 64 (D.C. Cir. 1957), vacated as moot, 355 U.S. 23; *National Lawyers Guild v. Brownell*, 225 F.2d 552 (D.C. Cir. 1955); *Industrial Workers of the World v. Clark*, *supra*.

This doctrine is perhaps applicable to bar a litigant from raising evidentiary matters which might best be raised before an administrative agency. However, it certainly has no application to situations such as this which involves a challenge to constitutional power. Where the challenge is to the power of the agency to act at all, courts will not require exhaustion of administrative remedies, especially where there are present, as here, "public questions particularly high in the scale of our national interest," *McCulloch v. Marineros de Honduras*, 372 U.S. 10, 17. "Where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative

7. See, e.g., *Rodriguez v. Seamans*, 463 F.2d 837 (D.C. Cir. 1972).

agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." *Public Utilities Comm. v. United States*, 355 U.S. 534, 540. See also *Staub v. Baxley*, 355 U.S. 313, 319; *Leedom v. Kyne*, 358 U.S. 184; *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (2nd Cir. 1967).

This is especially true where, as here, the litigant is not seeking to enjoin prospective administrative ation, but is seeking relief from final administrative action already taken against it. *McKart v. United States*, 395 U.S. 185; *Cole v. Young*, 351 U.S. 536; *Wills v. United States*, 384 F.2d 943 (9th Cir. 1967), *cert. den.* 392 U.S. 908. The rationale for this principle was explicated as follows by the Court of Appeals for the District of Columbia in its decision in the *Cole* case, 226 F.2d 337 at 339: "It [the government] says Cole failed to exhaust his administrative remedy and so his action must fall. While Cole failed to pursue the administrative remedy offered him—he affirmatively rejected it—nevertheless the administrative process was exhausted and a final administrative determination was reached and rendered. This is the nub of the rule that the administrative remedy must be exhausted. We think the Government's point is not well taken."

And most recently in *American Federation of Government Employees v. Acree*, ____ F.2d ___, No. 72, 1032, (decided February 21, 1973) the District of Columbia Court of Appeals stated:

> "Ordinarily, the exhaustion doctrine requires parties not merely to initiate administrative proceedings which may grant them relief and thus forestall the need for judicial intervention, but also to pursue such proceedings to their conclusion. See *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767 (1947). But there are cases where the customary rationales for the exhaustion of administrative remedies doctrine—avoidance of unnecessary judicial intervention and the need for full, unhampered exercise of agency expertise on a well developed

factual record of its own making, *see, e.g., McKart v. United States*, 395 U.S. 185, 193-195 (1969)—do not apply and the doctrine's application thus becomes pointless. In some cases the doctrine is no more than 'an exercise in futility,' *see Lodge 1858, American Federation of Government Employees v. Paine*, 141 U.S. App. D.C. 152, 166, 436 F.2d 882, 896 (1970), particularly where it is clear beyond doubt that the relevant administrative agency will not grant the relief in question. *See Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 505 (1928). In such cases, nothing is lost by circumventing an open, but assuredly ineffectual, avenue of administrative appeal and moving to the courts."

See also *Gibson v. Berryhill*, ___ U.S. ___, 41 U.S.L.W. 4576, 4580 (May 8, 1973); *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. den.* 386 U.S. 972.

The second doctrine applied by the Court of Appeals in cases such as this, is that of laches. However, the doctrine of laches requires that prejudice to the other party be demonstrated. *Gutierrez v. Waterman SS Corp.*, 373 U.S. 206, *Costello v. United States*, 365 U.S. 265. In both *Industrial Workers of the World, supra*, and *Veterans of the Abraham Lincoln Brigade*, 409 F.2d 1139 (D.C. Cir. 1969), *cert. den.* 396 U.S. 844, the Court of Appeals advanced the remarkable and novel notion that the Attorney General would be prejudiced if the court held that the Attorney General's list was unconstitutional since then other listed organizations might also sue to have the list declared unconstitutional. However, as the District Court noted here, the Court of Appeals has otherwise consistently held that laches does not apply since "the government is not prejudiced by the delay in the constitutional challenge to the list because no witnesses are needed and the parties are in the same position today as in 1953," *infra*, p. 10a.

The Court of Appeals has never given any explanation, let alone an adequate one, as to why the normal rules on exhaus-

tion and laches are not applicable to challenges to the Attorney General's list, and why such challenges are subject to procedural bars that are not generally applied, and appear to have been created solely to prevent consideration of such challenges. And in the present case, that Court has reached the ultimate in evasion by stating that this important challenge to the denial of constitutional rights has "been accorded full consideration by the Court" but the "issues presented occasion no need for an opinion," *infra*, p. 3a.

The refusal of the Court of Appeals to decide the constitutional issues presented here is matched by the evasive actions taken by the Attorney General whenever he has been confronted by a challenge to his constitutional power to list organizations. He abandoned his proposal to list the National Lawyers Guild, when its determination to litigate the matter to a conclusion became obvious. See the account in *Dombrowski v. Pfister*, 380 U.S. 479, 495, ftn. 12. He suddenly delisted *ex parte* two organizations, without any prior indication or administrative proceeding, after they filed a petition for certiorari in this Court challenging their listing, thus mooting the case. See *Association of Lithuanian Workers v. Brownell, supra*. He refused, following remand by the Court of Appeals in the *V.A.L.B.* case, to hold the hearing required by the remand order, thus leading that Court, on the second appeal, to order the Attorney General to remove the organization's name from his list of "subversive" organizations, 470 F.2d 441 (D.C. Cir. 1972). Since that time he has added no more organizations to the list, although it is apparent that there are now extant many new groups which are "subversive" by the standards reflected in the list. It is not an unfair inference that his forbearance has been, at least in part, due to his recognition that his authority to list is constitutionally dubious.

As matters now stand, unless this Court reviews the validity of the list in a case brought by an organization, such as petitioner here, which has been listed since 1947, the list will remain immune from judicial review, although it will continue to serve as an oppressive weight on the freedom of association.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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June 4, 1973

APPENDIX A

Executive Orders

Executive Order 9835, 12 F.R. 1935:

Part III

* * *

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Executive Order 10450, 18 F.R. 2489:

* * *

Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * *

Sec. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

* * *

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

* * *

Sec. 12. Executive Order No. 9835 of March 21, 1947, as amended is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

APPENDIX B

Judgment of the Court of Appeals, March 9, 1973

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Filed Mar 9 1973
Hugh E. Kline
Clerk

(No Opinion)
September Term, 1972
Civil Action 1806-70

No. 72-1341

DUNCAN GORDON
SOCIALIST WORKERS PARTY,

Appellant,

v.

WINTON M. BLOUNT, Postmaster General of the United States, *et al.*,

Appellee.

Appeal from the United States District Court
for the District of Columbia.

Before: McGowan, Tamm and Wilkey, Circuit Judges

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed herein by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

Judgment of the Court of Appeals, March 9, 1973

On consideration of the foregoing, it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

Hugh E. Kline
Clerk

APPENDIX C

Order of the District Court, December 23, 1971

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 1806-70

DUNCAN GORDON, *et al.*,

Plaintiffs,

v.

WINTON M. BLOUNT, *et al.*,

Defendants.

ORDER

This cause came before the Court on cross-motions for summary judgment. Having considered the pleadings, memoranda and exhibits thereto, and having heard counsel for the parties, the Court, on November 3, 1971, filed a memorandum opinion. In accordance with that opinion, it is this 23 day of December, 1971, by the United States District Court for the District of Columbia,

ORDERED, ADJUDGED AND DECREED, That the defendants, the Postmaster General of the United States, the Chairman and Members of the Civil Service Commission, and the Attorney General of the United States, and all persons in active concert and participation with them, be, and they hereby are, permanently enjoined from using the list of organizations issued by the Attorney General pursuant to Executive Orders 9835 and 10450, as such list has been or may be amended, as the sole basis for finding that any member or former member of the Socialist Workers Party is making a false statement if he denies that he belongs or has belonged to an organization which

advocates, teaches or favors the overthrow of the constitutional form of government of the United States or which seeks by force or violence to deny other persons their rights under the Constitution of the United States; and it is further

ORDERED, that except as hereinbefore provided, the plaintiffs' motion for summary judgment is denied and the defendants' motion for summary judgment is granted.

OLIVER GASCH
Judge

APPENDIX D

Opinion of the District Court, November 3, 1971

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 1806-70

DUNCAN GORDON, *et al.*,

Plaintiffs,

v.

WINTON BLOUNT, *et al.*,

Defendants.

MEMORANDUM OPINION

This matter comes on for consideration on cross motions for summary judgment and the hearing conducted pursuant thereto.

Plaintiff Gordon, a substitute letter carrier employed by the United States Post Office, was dismissed from his position and barred from other government employment for one year because he "lied" on his job application form. Gordon, who freely admits to membership in the Socialist Workers Party (SWP) had answered "no" to the following application question: "Are you now or have you ever been a member of any organization that favors the overthrow of the constitutional form of government of the United States or which seeks by force or violence to deny other persons their rights under the Constitution of the United States?" Noting that the SWP had been "listed" by the Attorney General pursuant to Executive Order 10450 and that "[i]t has been reported that the Socialist Workers Party advocates and teaches the overthrow of the United States Government by force or violence" the Civil Serv-

ice Commission dismissed plaintiff for making an intentionally false statement.

Plaintiff appealed, stating that he had not lied, in that, according to plaintiff, the SWP seeks to bring about socialism in the United States through peaceful means.[1] The appeal was denied and Gordon was removed from service December 10, 1970. Having exhausted his administrative remedies, he then brought suit in this Court seeking reinstatement and back pay. In light of the fact that plaintiff Gordon was restored to duty with full rights to back pay and returned to work June 14, 1971, the case, as to him, is moot.

Co-plaintiff Socialist Workers Party makes three allegations. First, that the use of the Attorney General's list, as exemplified by the case of Gordon, is improper and adversely affects the SWP and its members, i.e., when an applicant for a civil service job states that he is not a member of an organization which advocates the violent overthrow of the government, such statement does not constitute a lie simply because the applicant is a member of the SWP. The SWP next alleges that it never should have been placed on the Attorney General's list, and finally, that the list, itself, is unconstitutional.

The government, in reply has interposed three contentions which it believes preclude this Court from reaching the merits of the SWP's allegations. First, that Gordon's reinstatement moots the SWP's claims. The essence of this position is that while the government admits its action in Gordon's case was a "mistake," his reinstatement cures any harm done to SWP and that since it cannot be presumed that the government will repeat such "mistakes" in the future, the SWP is not threatened with existing or potential harm. This position lacks merit.

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1. The Court notes that the Seventh Circuit has held that, based upon the record before it, substantial evidence did not exist to support a finding that the Socialist Workers Party advocates or teaches the violent overthrow of the government. *Scythes v. Webb*, 307 F.2d 905, 909 (7th Cir. 1962).

Even if the government could guarantee against future "mistakes," it is noted that there is some evidence that the practice which resulted in Gordon's dismissal has continued. In a case comparable to Gordon's, another postal employee and SWP member was dismissed from service under similar circumstances some six months after Gordon's dismissal.[2] Thus, despite government assurances to the contrary, the threat of a repetition of "mistakes" continues to harm the SWP because the practice in question has been repeated. "When controversies present what are essentially recurring issues of public interest they are not mooted because the most recent particular occasion for consideration of the issue has come and gone." *Women Strike for Peace v. Hickel*, 420 F.2d 597, 604 (D.C. Cir. 1969) (footnote and citations omitted). See, *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 178-79 (1968); *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911).

The government next contends that since the SWP was placed on the Attorney General's list in 1953, and made no objection to its listing at that time, laches prevents SWP from making such challenge now. The Court of Appeals for this Circuit had ruled that failure to object to being placed on the Attorney General's list within the allotted statutory time period precludes judicial review of the propriety of such listing. *Industrial Workers of the World v. Clark*, 385 F.2d 687 (D.C. Cir. 1967). See, *Veterans of the Abraham Lincoln Brigade v. Attorney General*, 409 F.2d 1139 (D.C. Cir. 1969). Thus, plaintiff may not now challenge the basis for its being placed on the list. However, as the Court of Appeals said in *Industrial Workers, supra*, "To say that the IWW can no longer demand a judicial hearing on the validity of the 1953 listing is a far cry from concluding that the organization is eternally ousted from resort to the courts for other, subsequent complaints." *Id.*, at 692.

2. Affidavit of Kenneth Evenhuis, June 25, 1971, appended to plaintiffs' reply memorandum in support of plaintiffs' motion for summary judgment and in opposition to defendants' motion for summary judgment.

Accordingly, the SWP is not now precluded from attacking the *use* of the list as it affects its members or the constitutionality of the list, itself. These "other, subsequent complaints" are not barred by laches because the harm in question is continual. Moreover, since the government is not prejudiced by the delay in the constitutional challenge to the list because no witnesses are needed and the parties are in the same position today as in 1953, laches does not apply. See, *Major v. Shaver,* 187 F.2d 211 (D.C. Cir. 1951).

The final argument advanced by the government is that plaintiff SWP may not invoke the jurisdiction of this Court without first exhausting available administrative remedies. The only such remedy specifically referred to, however, contained in 28 C.F.R. 41.1, relates only to challenging the validity of the listing. This Court has already found that the SWP may not now challenge the basis for its listing. The government has cited no administrative remedy now available to the SWP to challenge the use of the list or its constitutionality. As such, the SWP is entitled to a decision on the merits of its remaining contentions, that the manner in which the list is used by the Civil Service Commission is erroneous and that the list, itself, is unconstitutional.

Section thirteen of Executive Order 10450, April 27, 1953, as amended, authorizes the Attorney General to "render to the heads of the departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program." Under such authority the Attorney General has made available to appropriate departments and agencies a list of organizations the Attorney General believes to come under the purview of the order. In the case at bar the Attorney General, under Executive Order 9835, the predecessor of 10450, in a list submitted to the Loyalty Review Board, September 17, 1948, included the SWP in a list of "communist" organizations, a list of "subversive" organizations, and in another list, as an "organization which seeks to alter the form of government of the United States by unconstitutional means." When Executive Order 10450 superseded 9835 the

SWP was redesignated without characterization, May 12, 1953, 18 C.F.R 2741. Finally, on July 2, 1971, President Nixon further amended 10450. The statutory authority for 10450 as currently amended includes, but is not limited to, 5 U.S.C. §§ 1101 et seq., 3301, 3571, 7301, 7313, 7501(c), 7512, 7532, and 7533. Thus, even in light of the fact that the statutory authority which provided the primary support for Executive Order 10450 as originally promulgated, sections 7311 and 3333 have been declared unconstitutional,[3] ample statutory authority exists to support Executive Order 10450 as a valid exercise of authority. See, *Cummings and Rudd v. Hampton*,____F. Supp.____(N.D. Cal. 1971).

The manner in which the Civil Service Commission has used the list is another matter. The government had conceded that it made a mistake in the case of Gordon and he has been reinstated with full back pay. As this Court analyzes the attachments relating to Mr. Evenhuis, discussed *infra* at page 3, the list was used in the exact way in his case as it was in Gordon's. If it was a mistake to separate Gordon, it is equally a mistake to separate Evenhuis.

Plaintiff SWP is entitled to the correction of such mistakes and assurance that the list will not be used in what is conceded as an unlawful manner in the future.

Accordingly, summary judgment is granted in favor of the government on all issues but the use of the list. On that issue summary judgment is granted in favor of plaintiffs.

OLIVER GASCH
Judge

Date November 3, 1971

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3. *Stewart v. Washington*, 301 F. Supp. 610 (D.D.C. 1969) (three-judge court). The government did not appeal from this decision.

APPENDIX E

Opinion in Cummings, et al. v. Hampton, et al.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
No. C-70 2130 RFP

PETER CUMMINGS, M.D., *et al.*,

Plaintiffs,

v.

ROBERT E. HAMPTON, etc., *et al.*,

Defendants.

MEMORANDUM AND ORDER GRANTING A PERMANENT INJUNCTION

This action is brought to enjoin defendants from enforcing two federal statutes, from requiring plaintiffs to answer two questions on an application form for federal employment, and from requiring plaintiffs to execute portions of an oath for such employment. Plaintiffs also seek a declaration that the statutes and Executive Order upon which such questions and oath are premised violate the Constitution. Jurisdiction exists under 28 U.S.C. §1331, as this action arises under the First and Fifth Amendments of the Constitution as well as 5 U.S.C. §§3333 and 7311. This Court earlier granted a partial preliminary injunction;[1] the matter is presently before the Court on plaintiffs' motion for a permanent injunction.

Plaintiffs Cummings, Rudd, and Greenfeld are serving as interns at Stanford University Medical Center. As part of their

internships they have been assigned for a period of three to four months to duty as interns at the United States Veterans Administration Hospital in Palo Alto, California. Initially, Drs. Cummings and Rudd were denied employment at the hospital because of their failure to complete a questionnaire (Veterans Administration Form 10-2850b) and to sign an oath (Civil Service Commission Standard Form 61). Following the granting of injunctions by this Court and the Ninth Circuit Court of Appeals, plaintiffs Cummings and Rudd began their employment at the hospital and have now completed their work assignments. Dr. Greenfeld is to begin his assignment at the hospital shortly. He has not been asked to sign the oath; but has been required to answer Questions 19 and 20 of the questionnaire, and will be denied employment if he fails to do so.

Initially this action must be dismissed as moot with respect to plaintiffs Cummings and Rudd, who have completed their work at the Veterans Hospital and can no longer be benefitted by the issuance of a permanent injunction. However, since Dr. Greenfeld is still subject to denial of employment at the hospital for his failure to complete the questionnaire, his request for a permanent injunction is very much alive. Moreover, plaintiff Greenfeld may properly proceed with this matter as a class action under Federal Rules of Civil Procedure Rule 23 (a), 23 (b)(1)(A), and 23 (b)(2).

I. The Oath

Civil Service Commission Standard Form 61, "Appointment Affidavits", contains four paragraphs, two of which were challenged by plaintiffs Rudd and Cummings only.[2] Having ruled that this action is moot as to these plaintiffs, the Court need not pass upon the constitutionality of the challenged paragraphs of the oath. Moreover, it is apparent that the Civil Service Commission has discontinued use of the objectionable language.

II. The Questionnaire

Plaintiff raises two arguments against the constitutionality of the government's use of Questions 19 and 20 in Veterans Administration Form 10-2850b.[3] First, plaintiff contends that the questions are unauthorized by law and that their imposition thus violates the Fifth Amendment guarantees of due process of law. Second, plaintiff contends that the challenged governmental inquiries are vague and overbroad, thus violating his First Amendment rights. Since this Court finds merit in plaintiff's second contention, further discussion of plaintiff's first contention is unnecessary.

Question 19 inquires of an applicant's membership in the Communist Party. In Question 20, the applicant is asked whether he has ever belonged to an organization which *to his present knowledge* advocates the overthrow of the government by unlawful means. Subdivision (3) of that question further inquires into the applicant's understanding of the aims and purposes of the organization at the time of his membership.

It is settled law that the Veterans Administration cannot deny employment to an applicant simply on the basis of his membership in the Communist Party or other subversive organizations. *United States v. Robel,* 389 U.S. 258 (1967); *Keyishian v. Bd. of Regents,* 385 U.S. 589 (1967); *Elfbrandt v. Russell,* 384 U.S. 11 (1966); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964). Denial of employment on this basis would result in a deprivation of the individual's rights under the First Amendment, since it would fail to discriminate between membership which may constitutionally be punished,[4] and membership which may not be so proscribed.[5] The only legitimate concern of the Veterans Administration is whether the individual is a member of a subversive organization, with knowledge of its unlawful purposes and with specific intent to further its unlawful aims; for the Constitution permits only such members to be punished for their association. Consequently, knowledge that an

individual is a member of the Communist Party or any other subversive organization is not, by itself, of substantial use to the Veterans Administration. *Keyishian v. Bd. of Regents, supra; Elfbrandt v. Russell, supra; Aptheker v. Secretary of State, supra.*

The Supreme Court has stated that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N.A.A.C.P. v. Button,* 371 U.S. 415, 438 (1963). Thus, our task is to delineate the scope of permissible government inquiry in terms broad enough to encompass all necessary and constitutionally useful information, but also in terms so clear that constitutionally protected activities will not be chilled or stifled.

The Supreme Court has recently rendered three decisions which are relevant to the problem now before this Court. In this trilogy, the Court upheld an inquiry similar to Question 20 and struck down two inquiries similar to Questions 19 and 20, all in the context of requirements for admission to the legal profession. Although there is some inconsistent language in the three opinions, it is possible to reconcile their holdings.

In *Law Students Civil Rights Research Council v. Wadmond,* 401 U.S. 154 (1971), appellant challenged, *inter alia,* Question 26 of the application required of candidates for admission to the New York bar. The question was framed as follows:

> "26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means? If your answer is in the affirmative, state the facts below.

> (b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overcome or overthrow the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?"

Id. at 9-10.

That question was held constitutional because it restricted its inquiry to knowledge of the unlawful purposes of an organization at the time of one's membership (part (a)), *and* included the specific intent of the member (part (b)). The Court found Question 26 "precisely tailored to conform to the relevant decisions of this Court," 401 U.S. at 165, which permit punishment for membership in an organization only when such membership is accompanied by knowledge of the organization's unlawful aim as well as specific intent to further those unlawful aims.

In *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) and *In re Stolar*, 401 U.S. 23 (1971), the Court held that Arizona and Ohio respectively could not inquire whether a prospective lawyer has ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence. 401 U.S. at 4-5, 27. The Court commented in *Baird* that:

> The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. [citations omitted.] Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these

> protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution. [citations omitted.]

401 U.S. at 5.

The Supreme Court did not focus in specifically on the differences between *Wadmond* on the one hand and *Baird* and *Stolar* on the other. However, the distinguishing factor most likely to account for the different results is that in *Wadmond*, unlike *Baird* and *Stolar*, the government's inquiry extended to knowing membership in a subversive organization and the existence of specific intent to further the organization's unlawful purposes.[6]

Analysis of Questions 19 and 20 on Veterans Administration Form 10-2850b in relation to the above trilogy of cases establishes their constitutional invalidity. Question 19 asks if the applicant has been a member of the Communist Party within the past ten years, without also inquiring whether the applicant knew at the time he was a member of any illegal aims or purposes of the Communist Party, or whether he then shared any such unlawful purposes. Thus, it transgresses the bounds established by *Baird* and *Stolar*.

While Question 20 does concern itself with whether the applicant knew of his organization's illegal purposes at the time of his membership, it does not thereby fall within the purview of the *Wadmond* decision. Question 20 first inquires whether the applicant has ever belonged to certain subversive organizations, and then in a separate subdivision requires the applicant to state what his understanding of the organization's purposes was while he was a member. Concededly, the *Wadmond* decision sanctioned two-part questions when the division is designed to narrow the class of applicants as to whom the government is likely to find further investigation appropriate. But it did so only when the first part of the question dealt with knowing

membership and the second with specific intent at the time of membership, not when the first part dealt with mere membership and the second with knowing membership, as in the instant case. In *Wadmond*, part (a) of the challenged question was not unconstitutional by itself under *Baird* and *Stolar*. The first part of Question 20, however, is unconstitutional under those decisions, and has the proscribed chilling effect even though followed by the subdivision dealing with knowing membership. Hence, Question 20 stands no taller in the wake of the First Amendment than Question 19.

Moreover, even assuming, *arguendo*, that the questions challenged herein may be constitutionally imposed on applicants for admission to the legal profession, it does not necessarily follow that they may be properly required of applicants for medical intern positions in government hospitals. "When a State seeks to inquire about an individual's beliefs and associations, a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Baird v. State Bar of Arizona*, 401 U.S. at 6-7; see *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963).

The Supreme Court has found sufficient legitimate governmental interest in the bar admission cases, largely because the legal profession is "dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government." *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. at 166; see *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). But the Government has not suggested any significant federal interest which would necessitate the inquiry undertaken by the Veterans Administration; and the record herein discloses no evidence to support such a governmental interest. Thus, plaintiff's First Amendment rights are not "outweighed by the State's interest in ascertaining the fitness of the employee for the post he holds,"[7] and the bar admission cases are distinguishable from the present case.[8]

In accordance with the foregoing memorandum,

IT IS ORDERED that defendants are permanently enjoined from requiring the plaintiff and those in the class of medical interns he represents to answer Questions 19 and 20 of Veterans Administration Form 10-2850b, as a condition of his and their employment.

Dated: Oct. 14, 1971.

/s/ Robert F. Peckham
United States District Judge

FOOTNOTES

1. In the Memorandum Decision re the preliminary injunction, the Court noted that there were pending before the United States Supreme Court certain cases bearing on the issues in the instant case, and that the forthcoming Supreme Court decisions in these cases might call for a different result.

2. B. Affidavit as to Subversive Activity and Affiliation.

I am not a Communist or Fascist. I do not advocate nor am I knowingly a member of any organization that advocates the overthrow of the constitutional form of the Government of the United States, or which seeks by force or violence to deny other persons their rights under the Constitution of the United States. I do further swear (or affirm) that I will not so advocate, nor will I knowingly become a member of such organization during the period that I am an employee of the Federal Government or any agency thereof.

Paragraph B, Civil Service Commission Standard Form 61, Revised December 1966.

C. Affidavit as to Striking Against the Federal Government.

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof. I do not and will not assert the right to strike against the Government of the United States or any agency thereof while an employee of the Government of the United States or any agency thereof. I do further swear (or affirm) that I am not knowingly a member of an organization of Government employees that asserts the right to strike against the Government of the United States or any agency thereof and I will not while an employee of the Government of the United States or any agency thereof, knowingly become a member of such an organization.

Paragraph C, Civil Service Commission Standard Form 61, Revised December 1966.

3. Veterans Administration Form 10-2850b.

> "19. Are you now or within the last ten years have you been a member of the Communist Party, U.S.A., or subdivision of the Communist Party, U.S.A."
>
> "20. Are you now, or within the last ten years have you been a member of an organization that to your present knowledge advocates the overthrow of the Constitutional form of Government of the United States by force or violence or other unlawful means? (If you answer "Yes" to 19 or 20 give on a separate sheet: (1) the name of the organization; (2) the dates of your membership; and (3) your understanding of the aims and purposes of the organization at the time of your membership.)"

4. See *Scales v. United States*, 367 U.S. 203 (1961).

5. See *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

6. On the surface, it is difficult to reconcile the *Baird* and *Stolar* holdings with the Supreme Court's decisions in *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), and *In re Anastapolo*, 366 U.S. 82 (1961), which are cited with approval in the *Law Students Civil Rights Research Council* case. As Justice Blackman states in dissent in *Baird v. State Bar of Arizona*, *supra*, 401 U.S. at 12, "Neither case has ever been expressly overruled. Neither is now expressly overruled." However, in reading the recent trilogy of cases discussed above, this Court has come to the conclusion that *Konigsberg* and *Anastapolo*, although not "expressly overruled," have been fundamentally limited, and that the Supreme Court is struggling to put them to rest.

7. *Konigsberg v. State Bar of California*, 366 U.S. 36, 52 (1961).

8. This distinction was implicitly recognized by the dissenting justices in the *Stolar* case, who commented on the "somewhat significant difference between non-tenured school teachers [referring to *Shelton v. Tucker*, 364 U.S. 479 (1960)] and about-to-be licensed attorneys." *In re Stolar*, 401 U.S. at 32. See also *Zuckerman v. United States*, —— F. Supp. ——, (D. Minn. July 20, 1971) *Soltar v. Postmaster-General*, 277 F. Supp. 579 (1967).

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No. 72-1631

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SOCIALIST WORKERS PARTY, PETITIONER

v.

E.T. KLASSEN, POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1631

SOCIALIST WORKERS PARTY, PETITIONER

v.

E.T. KLASSEN, POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an organization which since 1947 has been on the Attorney General's list of subversive organizations,[1] seeks a determination in this case that

[1]Executive Order 9835, 12 Fed. Reg. 1935, issued March 21, 1947, established an Employees Loyalty Program in the Executive Branch of the government. By this order, the Department of Justice was directed to furnish the Loyalty Review Board with the name of each organization which the Attorney General, after appropriate investigation and determination, designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." The name of the petitioner was among those transmitted to the Loyalty Review Board on November 24, 1947. Pursuant to the same authority, the Loyalty Review Board disseminated such information to all federal departments and

the Attorney General lacks constitutional authority to compile such a list. The case was originally brought as a joint action in United States District Court for the District of Columbia by petitioner and one of its members, Duncan Gordon. The latter, a substitute letter carrier, had denied on his job application form being a member of any organization which "favors the overthrow of the constitutional form of government of the United States or which seeks by force or violence to deny other persons their rights under the Constitution of the United States." The Civil Service Commission had ruled, on the basis of petitioner's inclusion on the Attorney General's list, that this answer constituted a false statement which required that Gordon be dismissed and barred from other government employment for a one year period.

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agencies on December 4, 1947, and public notice was given of such action in the Federal Register on March 20, 1948, 13 Fed. Reg. 1471.

On April 27, 1953, President Eisenhower issued Executive Order 10450, 18 Fed. Reg. 2489, which revoked and superseded Executive Order 9835 and established new standards and procedures, based on considerations of security rather than loyalty, governing the employment and retention in employment of persons in the federal service. As in the earlier loyalty program, one of the factors to be considered in reaching the prescribed determination of whether employment is "clearly consistent with the interests of national security," and concerning which information was to be developed, was membership in organizations which are "totalitarian, Fascist, Communist, or subversive * * *" (Section 8(a)(5)). The new order continued the direction that the Attorney General furnish information concerning designated organizations, but provided that it be furnished directly to the heads of the executive departments and agencies (Sections 12 and 13). Pursuant to Executive Order 10450, the Attorney General, on April 29, 1953, redesignated the organizations previously designated under Executive Order 9835, including the petitioner, 18 Fed. Reg. 2741.

The letter carrier sought reinstatement and back pay. Petitioner alleged that it was irreparably injured by its inclusion on the list and the use of the list by the Civil Service Commission, in that the reputation and prestige of it and its members were damaged, it suffered loss of membership dues and other revenues, and there was interference with the circulation of its publications, the conduct of its activities, and the fulfillment of its purposes. The dismissal of the letter carrier was cited as one example of the type of injury suffered by petitioner and its members. Other examples cited were the use of the list by the Department of Defense for screening defense industry employees, and by the Coast Guard for screening applicants for employment in the Merchant Marine, and similar allegedly invidious uses of the list by state and local governments and by private groups and individuals.

Petitioner sought (1) a declaration that both the compilation of the list and petitioner's inclusion thereon are illegal and unconstitutional and (2) orders enjoining the Attorney General from continuing the list in effect, requiring him to notify all government agencies and the public generally that petitioner's listing was illegal, void, and withdrawn, and enjoining the Civil Service Commission from continuing to use the list.

The case became moot as to the letter carrier when he was restored to duty with full rights to back pay. The district court found, however, that petitioner had a continuing interest in the suit because of the possibility of similar use of the list in respect to others of its members who were government employees (Pet. App. 9a). While holding that compilation of the list was constitutionally authorized (Pet. App. 10a-11a) and that petitioner was barred by laches from challenging its inclusion

thereon (Pet. App. 9a), the court ruled that the list could not be used against any government employee in the manner in which it had been used against the letter carrier (Pet. App. 11a). It therefore entered an order permanently enjoining the use of the list as the sole basis for finding that a member or former member of petitioner had made a false statement on the loyalty oath section of his application for government employment (Pet. App. 5a-6a). On appeal by petitioner, the court of appeals affirmed without opinion (Pet. App. B).

As the memorandum opinion of the district court, upon which we rely, indicates (Pet. App. D), petitioner received the full remedy to which it was entitled.[2]

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[2]The district court opinion observed (Pet. App. 11a) that there is ample statutory authority to support Executive Order 10450, citing, in addition to the various statutes supporting that authority, *Cummings and Rudd* v. *Hampton* (N.D. Cal., No. C-70-2130 RFP, decided February 1, 1971). That decision entailed the grant of a preliminary injunction against the use of certain questions on a government employment form. The court ultimately issued a permanent injunction against a modified version of the questions (Pet. App. E). Contrary to the petitioner's suggestion (Pet. 9), the government has appealed the latter decision. *Cummings* v. *Hampton* (No. 72-2559, C.A. 9). The broad issue raised here concerning the authority to compile a list of subversive organizations, vis-a-vis the manner in which such authority is exercised, is not presented in *Cummings*.

In this respect, we note that the authority to compile such a list was implicitly recognized by this Court in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-513. In *Aptheker*, the Court declared unconstitutional Section 6 of the Subversive Activities Control Act of 1950, which provided that, when a Communist organization was registered or under final order to register, it was unlawful for a member with knowledge of this status to apply for or use a passport. One of the bases for declaring the prohibition unconstitutional was the availability of less drastic means of safeguarding national security. One such means, expressly noted by the Court, was the Federal Employee Loyalty Program established pursuant to Executive Order No. 9835, the precursor of

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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the now-operative Executive Order No. 10450, under which membership in a Communist organization was one factor to be weighed in determining the loyalty of an applicant or employee.

Moreover, this Court recognized in *Cole* v. *Young*, 351 U.S. 536, 543-544, that Executive Order 9835 was promulgated pursuant to the authority of the general personnel laws and was not, as petitioner suggests, primarily dependent upon authority conferred by statutes which have been declared unconstitutional (*e.g.*, 5 U.S.C. 7311; see *Stewart* v. *Washington*, 301 F. Supp. 610 (D.D.C.)).

The President's constitutional and statutory powers in issuing Executive Order 9835, which established the Federal Employee Loyalty Program, came under attack in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. This Court there determined that Executive Order 9835 was defective by virtue of its failure to provide procedural due process. The opinion did not, however, suggest either that the Program was unconstitutional or that the President lacked the power to delegate to the Attorney General authority to utilize for the purposes of the Program a list of designated organizations, and, of course, it did not consider the procedures available under Executive Order 10450 which was in effect at the time this case was brought. Executive Order 10450, was amended by Executive Order 11605, 36 Fed. Reg. 12831, issued on July 2, 1971. Among other things, that order transferred to the Subversive Activities Control Board the function of conducting hearings and making findings on organizations proposed for designation by the Attorney General. It also established standards for determining whether an organization came within a designation category. Previous designations were not affected, except to the extent that any designated organization, under Section 2(i) of the Order, could petition the Board for a determination "that such organization does not currently meet the standards for designation." Executive Order 11605 was, however, vitiated when funds were not appropriated for its implementation. Thus, there is presently no method available by which a designated organization may challenge its listing. The Department of Justice is presently considering new regulations to remedy this situation.